

IN THE HIGH COURT OF GUJARAT
AHMEDABAD

SPECIAL CIVIL APPLICATION NO.6389 OF 1995
A N D
CIVIL REVISION APPLICATION NO. 898 OF 1995

Date of Decision: 10th January, 1996

For Approval and Signature:

Hon'ble Mr. Justice : S.D. SHAH

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Appearance in C.R.A. No. 898 of 1995
Mr. R.R. Tripathi with Mr.D.P. Vora for the petitioner
Ms. Sejal Mandavia, AGP for respondent No.1
Mr. K.H. Baxi for respondents No. 2 and 3

Appearance in Spl.C.A. No. 6389 of 1995
Mr. R.R. Tripathi with Mr.D.P. Vora for the petitioner
Mr. K.H. Baxi for respondents

Coram: S.D. SHAH, J.
Date : 10th January, 1996

ORAL COMMON JUDGMENT:

1. Rule. Ms. Sejal Mandavia, AGP waives service of Rule on behalf of Respondent No.1 in Civil Revision Application and Mr. K.H. Baxi waives service of Rule on behalf of Respondents No. 2 and 3 in C.R.A. and 1 and 2 in Spl. C.A. With the consent of the learned advocates appearing for the parties, the matters are finally heard together and decided by this common judgement.

2. These two proceedings are initiated by petitioner Joshi Nareshkumar Kantilal and they are directed against the order of this termination from service as Primary Teacher passed by District Panchayat, Bhavnagar and District Primary Education Officer.

3. In Special Civil Application filed under Article 226 of the Constitution of India, the petitioner has inter alia prayed for issuance of a writ of mandamus directing the respondents to follow the guidelines issued by the State Government in Circular dated 22nd October, 1984 and to provide opportunity to the petitioner from the stage of first notice dated 1st of March, 1995 and thereafter to follow the procedure prescribed by Law. It is also pointed out that till then, the petitioner should be permitted to discharge his duties as Primary Teacher and injunction was also prayed for restraining authorities from terminating the services of the petitioner as Primary Teacher.

4. In Civil Revision Application, the petitioner has challenged the legality and validity of the order passed by Assistant Judge, Bhavnagar, in Misc. Civil Appeal No. 97 of 1995 dated 12th of May, 1995, whereby Misc. Civil Appeal is dismissed and the order passed by the Second Joint Civil Judge, SD, Bhavnagar, below Exhibit-5 in Regular Civil Suit No. 174 of 1995 is confirmed. By the said order, the learned trial judge has rejected the application for temporary injunction filed by the petitioner against his termination in Regular Civil Suit No. 174 of 1995. In short, two courts below have concurrently refused to grant temporary injunction during the pendency of the suit against the order of termination passed against the present petitioner by the District Panchayat and District Primary Education Officer. The said Civil Revision Application was circulated before A.N. Divecha, J. on 22nd May, 1995 and notice was issued returnable on 13th of June, 1995 and ad interim relief in the same terms as was granted by the lower appellate court was granted.

5. It appears that thereafter the petitioner was advised to file petition under Article 226 of the Constitution of India and accordingly Special Civil Application No. 6389 of 1995 is filed for the reliefs already set out hereinabove and when it was circulated before the learned Single Judge, M.S. Parikh, J. has directed the said Special Civil Application to be placed along with Civil Revision Application No. 898 of 1985. The matters were thereafter notified before this Court and after hearing the learned counsel appearing for both the parties, they were treated as part-heard before this Court.

6. Since the dispute involved in these two proceedings is between the same parties and since they originate from the order passed by the respondents dismissing the petitioner from service, petitions are heard together and are being disposed of by this common judgment.

7. A few relevant facts giving rise to the present proceedings are required to be stated in brief and they are as under :

i) It appears that the District Primary Education Officer, Bhavnagar District Panchayat issued an advertisement for filling in the posts of Primary Teacher in the schools being run by the District Panchayat, Bhavnagar. As per the said advertisement, 200 posts of Primary Teacher were to be filled in and eligible candidates were required to apply on or before 15th of October, 1986.

ii) It appears that the petitioner applied pursuant to such advertisement for being considered for the post of Primary Teacher and on being selected, for being appointed on the post of Primary Teacher. By order dated 16th of January, 1987, the petitioner came to be appointed as Primary Teacher as he was selected for the post on purely temporary basis subject to the terms and conditions stated in the order of appointment. The order of appointment is issued by District Primary Education officer. The petitioner was thereafter posted to serve as Primary Teacher at village Sinsya, Taluka Talaja and he was thereafter

serving as such on the post of Primary Teacher.

iii) Thereafter on further enquiry, it was found that petitioner and other 11 teachers have procured their appointment as Primary Teacher by producing forged or concocted certificates and therefore vide order dated 28th December, 1992, passed by the District Primary Education Officer, services of the petitioner came to be terminated. The order of termination, inter alia recited that the petitioner and other 11 teachers have obtained appointment as Primary Teacher and that police complaints are lodged and since the appointment was obtained by fraud, their services were terminated.

iv) It appears that thereupon the present petitioner instituted Special Civil Application No. 5427 of 1993 in this Court and under the order of injunction granted by this Court, he continued in service.

v) It appears that based on the decision of the learned Single Judge of this Court in the case of HIRABEN JIVANBHAI CHAUDHARI v. R.C. RAVAL reported in 34 (1) GLR 66 the respondent District Panchayat as well as District Primary Education Officer passed orders dated 4th of October, 1993 and 13th of October, 1993, whereby the petitioner was reinstated in service subject to the right of the respondent to take action against the petitioner in accordance with Law and subject to the outcome of the police case lodged against the petitioner. The order dated 13th October, 1993, clearly recited that petitioner was being reinstated pursuant to the order of the High Court without prejudice to the right of the respondents to hold regular departmental enquiry. The petitioner accordingly continued in service and Special Civil Application No. 5427 of 1993 came to be dismissed and notice was discharged. It appears that thereafter based on the principles of law laid down by this Court in the case of

HIRABEN JIVANBHAI CHAUDHARI (supra), the respondents issued notice to show cause dated 1st of March, 1995 inter alia stating that at the time of recruitment as Primary Teacher, the petitioner produced bogus mark sheet of SSC with a view to obtaining higher merit and thus got selected. The notice also clearly stated that the petitioner has firstly appeared in SSC Examination in March, 1978 and has failed and for the second time he has appeared in October, 1978 and has failed. He lastly appeared in the Examination in March 1979 and he was successful at the third attempt. Thus, despite his knowledge that he has passed SSC Examination after three trials, the petitioner suppressed the factum of his failure to pass the examination at the first two trials. He thereafter produced a mark sheet, which was false, bogus, got up and concocted to his knowledge. The various details of his seat number, the marks obtained by him at the relevant examination and the ultimate result is also stated in the tabular form in the show cause notice and petitioner was called upon to show cause as to why his services should not be terminated or as to why departmental action should not be taken against him. In Para 3 of the notice, the District Primary Education Officer resorted to the provisions of Rule 5(a) of the Gujarat Panchayat Service Discipline and Appeal Rules, 1964 and called upon the petitioner to show cause as to why he should not be dismissed from service of Primary Teacher.

- vi) To such notice, the petitioner sent his reply dated 15th March, 1995, inter alia, contending that for this very misconduct, Crime Register No. 524 of 1992 was pending where police enquiry was in progress and that he was released on bail by Sessions Court. He stated that the charges levelled against him in the aforesaid show cause notice are the very charges for which the criminal complaint is filed and therefore it was not

possible for him to disclose his defence or to enter into merits of the charges levelled against him and since the enquiry sought to be conducted was with respect to the selfsame charges for which criminal proceedings were pending, department proceedings should be stayed. It is the case of the respondent that such reply dated 15th of March, 1995 is not received by the respondents at all and in fact in the plaint of the suit filed in the trial court, the petitioner has nowhere put forward the claim that he has replied to the notice. This being a disputed question of fact, much importance cannot be attached to the aforesaid reply allegedly given by the petitioner.

vii) It appears that thereafter the District Primary Education Officer, vide notice dated 7th of April, 1995 called upon the petitioner to show cause as to why he should not be dismissed from service as he has not replied to the notice dated 8th of March, 1995 nor has he made any oral representation and since he has obtained appointment by perpetrating fraud by producing mark sheet which was false and forged to his knowledge, the misconduct was proved and therefore he was given another opportunity to show cause by 17th of April, 1995.

viii) Thereafter, by order dated 24th of April, 1995, the District Primary Education Officer dismissed the petitioner from service in exercise of the powers conferred upon him by the Gujarat Panchayat Services Disciplinary Appeal Rules, 1964, holding that the petitioner has failed to show cause to the charges levelled against him despite opportunities having been provided to him and that it was established in absence of any defence by him that forged and concocted mark sheet was produced by him, based on which, he has obtained appointment to the post of Primary Teacher. It is the case of the

petitioner that he has not received such order of dismissal, while it is the case of the authority that the order was attempted to be served on the petitioner, he read the order and thereafter refused to accept the order or to sign in token of acknowledgment of the receipt of the order.

ix) In between, the petitioner instituted Regular Civil Suit No. 174 of 1995 in the Court of Civil Judge, SD, Bhavnagar, wherein he applied for temporary injunction by application at Exhibit-5 dated 15th of April, 1995. By that application, he inter alia prayed that the District Panchayat and the District Primary Education Officer should be restrained from holding any departmental enquiry against him and from passing any order and from implementing any order in case such order is passed and also restraining them from in any way restraining the petitioner from discharging his duties as Primary Teacher. The trial court issued urgent notice and after hearing the respondents by judgment and order dated 28th of April, 1995 had rejected the application for temporary injunction.

x) Being aggrieved thereby, the petitioner preferred Misc. Civil Appeal No. 97 of 1995 and the Assistant Judge, Bhavnagar, by judgment and order under challenge in Civil Revision Application, dismissed such appeal by placing reliance upon the decision of this Court in the case of HIRABEN JIVANBHAI CHAUDHARI (supra).

xi) It is against such concurrent judgments and orders of two courts, this Civil Revision Application under Section 115 of the Code of Civil Procedure is filed, which will be dealt with hereafter, after narration of facts.

xii) During the pendency of the aforesaid Civil Revision Application, the petitioner instituted the present Special

Civil Application on 26th of July, 1995 and the same was ordered to be heard along with Civil Revision Application. In view of the interim order passed in Civil Revision Application, the petitioner has continued to serve as Primary Teacher till date.

8. In the aforesaid fact situation, Mr. R.R. Tripathi learned Counsel appearing for the petitioner strenuously urged before this Court that since the scope of judicial enquiry in Civil Revision Application would be limited since two courts have concurrently refused to grant injunction in favour of the petitioner, in substantive petition filed under Article 226 of the Constitution of India, the petitioner has a substantial case, it is required to be examined by this Court. He submitted that when with respect to the very misconduct, on the selfsame facts, criminal prosecution is already launched against the petitioner, it was not open to the respondent authority to proceed further with the enquiry and to dismiss the petitioner from service. He submitted that the petitioner has by reply to the show cause notice pointed out that it was not possible for him to disclose his defence as criminal prosecution was already filed against him and since he cannot be compelled to disclose his defence which would prejudice his right to defend in a criminal trial, he, therefore, submitted that consistent with the principle of law propounded by the Hon'ble Supreme Court as well as the High Court of Gujarat, the enquiry should have been stayed from the stage of the first show cause notice and that petitioner should not have been dismissed from service.

9. Secondly, he has submitted that in any case if it is accepted that petitioner has obtained the appointment by producing mark sheet, which was forged or concocted to his knowledge, even if it is accepted that he has passed the SSC Examination at the third trial, he was eligible for being appointed to the post of Primary Teacher even after deducting the marks which are usually deducted for every attempt consistent with the Government Circular.

10. Mr. K.H. Baxi, learned Counsel appearing for the respondent on the other hand submitted that the petitioner has never replied to the show cause notice and has never taken up the contention that the departmental proceedings should not be proceeded with as criminal case was filed for the very misconduct. He, therefore, submitted that the respondents are justified in passing

the order of dismissal in absence of any defence from the petitioner. As regards the second submission raised by the petitioner, he submitted that even after deducting the mark for every attempt in passing the SSC Examination, if the eligibility of the petitioner was considered, he was not eligible for being appointed to the post of Primary Teacher. In this behalf, he pointed out that a person, who has knowingly and deliberately obtained appointment by producing false and forged mark sheet has perpetrated fraud on the authority and when the foundation of any contract is laid or based on fraud, this Court in its writ jurisdiction, should be loath to interfere with the departmental action which is taken against the petitioner. The very contract of service is void and its foundation is based on fraud and even calling upon the department to consider the case of the petitioner on the basis of marks obtained by him after deducting the marks for every attempt, would tantamount to putting a seal of approval on perpetration of fraud by employee in obtaining public employment.

11. Turning now to the second submission of Mr. Tripathi, this Court, with a view to seeing that an employee who has put in service of around seven to eight years is not rendered jobless, made a sincere attempt to know from the authority as to whether the petitioner could have got appointment as Primary Teacher based on the marks obtained by him in the third examination after deducting the marks for previous two attempts. As per the Government Circular dated 17th of November, 1983, issued by the Education Department, State of Gujarat, it is stipulated that if any candidate has obtained eligibility by passing examination, for every attempt made in passing examination, one per cent mark shall be deducted and thereafter the eligibility for selection is to be considered. It is further stipulated that if a candidate has taken advantage of exemption from appearing in certain subjects, the marks obtained in each subject shall be totalled subject wise, and it shall thereafter be averaged by dividing it by as many as attempt as the candidate has made in passing the examination. In the case of the petitioner, admittedly, he has passed the examination at the third attempt and, therefore, marks obtained in three examinations are required to be totalled up and thereafter by dividing the same by three, average marks are required to be reached and accordingly, the petitioner has obtained 35 per cent marks. In fact, in three attempts, he has totally obtained 599 marks in 17 subjects which would work out to 35 per cent. He, therefore, submitted that if the candidate, who was lastly included in the merit list in the year 1988 is

taken into consideration, the petitioner was not eligible to be selected. In the general category of candidates in the year 1988 even the candidates between the range of 68.5% to 45.52% were admitted to PTC course, the petitioner having obtained 35 per cent marks, therefore, could not have obtained even admission to PTC Course and his very admission to PTC course was based on fraudulent entry because of production of forged and false mark sheet of SSC. The petitioner could have perhaps based on the his SSC qualification obtained appointment as untrained teacher, but the said question is not required to be examined as he has obtained appointment as trained teacher based on his qualification of SSC and PTC. It is in this fact situation that this Court shall have to answer the second submission raised by Mr. R.R. Tripathi, learned Counsel appearing for the petitioner. The attempt of this court was to see that if the petitioner could have otherwise got appointment based on his performance in SSC Examination simpliciter, whether his appointment could be protected despite fraud committed by him. The Court was undoubtedly being over liberal to the petitioner, but, from the factual data produced before this Court, it transpires that as the petitioner could not have under any circumstances got appointment to the post of Primary Teacher based on his performance in SSC Examination, therefore, the second submission of Mr. Tripathi cannot be countenanced and shall have to be rejected.

12. Turning now to the first submission of Mr. Tripathi, it is undoubtedly true that the respondents have acted under the Gujarat panchayat Service Discipline and Appeal Rules, 1964 and have dismissed the petitioner from service by the impugned order dated 24th April, 1995. It is not an order of termination or discharge simpliciter on the ground that since the petitioner was temporary in service and since he has obtained appointment by fraudulent means, his appointment was liable to be terminated and was therefore terminated. In the case of HIRABEN JIVANBHAI CHAUDHARI (supra) this Court was called upon to decide the question as to whether a contract of service which is tainted with fraud or which is obtained by fraudulent means can be avoided by a party to the contract simply by an order of termination of service without even providing or following rudimentary principles of natural justice. This Court analysed the law on the subject and raised three propositions which were required to be answered. The first proposition canvassed by the petitioners before this Court was that even in cases where public employment is procured by fraudulent/doubtful means, or by false

representation or misrepresentation of facts, the employee acquires a status and he cannot be deprived of such status unless by following procedure prescribed by statutory rules/regulations or by compliance with Article 311(2) of the Constitution of India. This first proposition being a very broad proposition was not accepted by this Court and it was stated that in order to see that public administration and services should be upright, efficient and above board or suspicion, the public post should be manned by persons of good moral character. Those who seek entry to public employment by perpetrating fraud, misrepresentation, false representation or by dubious means are, but for their reprehensible conduct not entitled to enter public employment. Had such persons not committed fraud or misrepresentation by suggestio vari or suppressio falsi or by non disclosure of true facts or disclosure of facts which are false to their own knowledge or by partial nondisclosure or partial disclosure solely with a view to seek public employment they would not have got the entry in the public employment. In such cases, contract of employment would not have been entered into. Secondly, they would not have acquired status and, therefore, rights flowing from the Statutory Rules or Regulations would not come to their rescue. The very first step towards entry into public employment is vitiated by their conduct. This court therefore held that for such a conduct which has preceded the contract of employment the employer is not seeking to impose any penalty. He is merely exercising right given to him by law, namely, of avoiding contract.

13. The second proposition which was canvassed before the Court and dealt with by this Court was to the effect that once it is found that the contract of employment is secured by fraud or suppression of material facts or disclosure of untrue facts it is a stillborn or non-est contract and it could be terminated by the Government forthwith. It was submitted that for avoidance of such contract the rules of natural justice are not required to be followed nor is a perpetrator of fraud required to be heard before the contract of employment is terminated. It was submitted before the Court that fraud vitiates everything and where source of right is rooted in fraud no enforceable right stricto sensu would arise in favour of employee. This proposition was regarded as too broad extreme proposition by this Court and it was not accepted. This Court, however, held that rudimentary principles of natural justice are required to be followed and the employee is required to be given an opportunity to show cause as to whether he has obtained employment by

any of the doubtful means alleged against him. A notice to show cause and taking into consideration the explanation or defence of the employee would be sufficient compliance with the rules of natural justice and nothing more was needed. The third proposition that a regular enquiry should be made under Article 311(2) of the Constitution of India by giving a regular charge sheet setting out the misconduct and by holding a regular departmental enquiry was not accepted by this Court.

14. Keeping the aforesaid position of law in mind, now it is required to be examined in the present case that the respondents have not resorted to their power of terminating the contract simpliciter as the contract was obtained by fraud. After the intervention of this Court in the earlier petition, the respondents, in fact, issued the show cause notice coupled with charge sheet under the statutory rules and called upon the petitioner to reply to such charge sheet. By that time, the criminal prosecution was already filed against the petitioner. According to petitioner, he replied to the charge sheet while the respondents have taken up the stand that they have not received such reply. The fact remains that ultimate order which is passed is an order of dismissal from service i.e. punishment and an order imposing major punishment for the misconduct under the statutory rules. Mr. R.R. Tripathi therefore submitted that in case the petitioner ultimately succeeds in the criminal case, his right to defend himself should not be abridged and that he should be permitted to defend himself in a departmental enquiry which may commence from the stage of the issuance of the show cause notice. Mr. K.H. Baxi, learned Counsel appearing for the respondent cannot successfully contend before the Court that the order in question was an order of termination simpliciter. After perusing the order, he has to admit that the order is one of punishment passed under the statutory rules, by recording the finding that the petitioner has committed fraud while obtaining employment by producing false or forged mark sheet. He has also to admit that for this very charge, criminal prosecution is pending against the petitioner. In view of the aforesaid though at this stage, no interference of this Court is called for, in case, the petitioner ultimately succeeds in criminal prosecution and if he is exonerated or acquitted from all the charges levelled against him, it will be open to him to call upon the respondents to reopen the enquiry from the stage of the first show cause notice and the respondents shall thereafter provide an opportunity to the petitioner file his reply to the charge sheet and shall hold a regular departmental enquiry as envisaged

under the Rules of 1964.

15. Subject to the aforesaid observations, no relief could be granted to the petitioner in this Special Civil Application. The Civil Revision Application is also liable to be dismissed as no jurisdictional error is pointed out to this Court which would call for interference of this Court under Section 115 of the Code of Civil Procedure.

16. In the result, both Special Civil Application and Civil Revision Application fail. Rule is discharged. Ad interim relief granted earlier in Civil Revision Application stands vacated. No costs.
